Congress of the United States
Washington, DC 20515

October 26, 2020

The Honorable Eugene Scalia
Secretary of Labor
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

RE: Comments on the Notice of Proposed Rulemaking, RIN 1235-AA34, Independent Contractor Status Under the Fair Labor Standards Act

Dear Secretary Scalia:

We urge the Department of Labor to withdraw its harmful proposed rule that would narrow the interpretation of employee status under the Fair Labor Standards Act of 1938. This proposed rule will threaten workplace protections, especially for women workers.

The Fair Labor Standards Act (FLSA) sets minimum wage, overtime, and child labor standards, and it includes a broad employment standard to make sure that its protections extend to a wide range of workers, including women. Congress established a broad definition of "employ" to include "to suffer or permit to work."[1] This definition rejects the narrower common law standard of employment, which focuses on the degree to which an employer has control over an employee.[2] In fact, employment under the FLSA's "suffer or permit to work" standard is the "broadest definition that has ever been included in any one act."[3] For decades, the courts have effectuated congressional intent to define employment status broadly by applying a multi-factor economic realities test to help determine if a worker is economically dependent on the potential employer or in business for themself.[4] Different courts use slightly different factors, but the ultimate question centers on economic dependence.[5]

The Department's proposed rule to narrow its interpretation of employee status directly conflicts with the FLSA and congressional intent by creating a new test that centers around a control factor.[6] In passing the FLSA, Congress intended "to eliminate, as rapidly as practicable, substandard labor conditions throughout the nation."[7] Unfortunately, the Department's proposed narrow control test could jeopardize workplace protections for many workers. Under the Department's narrow control test, workers could be misclassified if employers improperly change their workers' classification from employee to independent contractor or hire them as independent contractors when they would otherwise be classified as employees.

[1] 29 U.S.C. 203(g).
[2] "[T]he broad language of the FLSA, as interpreted by the Supreme Court . . . demands that a district court look beyond an entity's formal right to control the physical performance of another's work before declaring that the entity is not an employer under the FLSA." *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 69 (2d Cir. 2003).
[3] *United States v. Rosenwasser*, 323 U.S. 360, 363 (1945) (quoting 81 Cong. Rec. 7,657 (1938) (remarks of Sen. Hugo Black)).
[4] *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 301 (1985) (the test of employment under the FLSA is economic reality); *Goldberg v. Whitaker House Co-op, Inc.*, 366 U.S. 28, 33 (1961).
[5] *Antenor v. D & S Farms*, 88 F.3d 925, 932-33 (11th Cir. 1996).
[6] Two factors, the nature and degree of the worker's control over the work and the worker's opportunity for profit or loss, are deemed core factors and given undue weight. According to the Department, where the two core factors point toward the same classification, the analysis is virtually complete and the other three factors should be approached with skepticism. Independent Contractor Status Under the Fair Labor Standards Act, 85 Fed. Reg. 60600, 60612 (proposed September 25, 2020) (to be codified at 29 C.F.R. pt. 780, 788, 795).
[7] *Powell v. United States Cartridge Co.*, 339 U.S. 497, 510-11.

The Department's proposal fails to estimate the number of workers who could be misclassified as independent contractors as a result of its proposal; nor does it address the proposed rule's effect on low-wage industries, including those in which a disproportionate number of women work.

Women make up nearly half of our workforce. In September 2020, the labor participation rate was 56.3 percent among white women ages 20 and older, 59.8 percent among Black women, and 57 percent among Latina or Hispanic women.[8] Their wages pay for rent, groceries, child care, and health care. Sixty-four percent of mothers in the United States are either the sole family breadwinner or the co-breadwinner.[9]

Women are also on the frontlines of the coronavirus pandemic as essential workers, risking their lives every day to provide for our communities. According to a recent report, "one in three jobs held by women has been designated as essential."[10] At the same time, women are being forced out of the labor market as a result of the economic consequences of the pandemic. In September 2020, four times more women dropped out of the labor force than men.[11] The experiences of women of color are even harsher. Black women, Asian women, and Latinas have consistently reported higher rates of lost employment income in their households than their white counterparts.[12]

Even before the pandemic and the current economic crisis, women struggled with economic insecurity in low-wage jobs. Long-standing structural inequities, including racism, sexism, unpaid and unequal caregiving responsibilities, and discrimination in the workplace erode the job and wage mobility for many women of color. Women represent 64 percent of the workforce in the 40 lowest paying jobs, and 42 percent of women in low-wage jobs were living near or below the federal poverty line in 2018.[13] The realities are even more alarming for women of color, especially Latinas, Native women, and Black women, who are overrepresented in low-wage jobs compared to their share of the overall workforce. This proposed rule could make things worse for these workers, who are already often underpaid and undervalued.

Under the Department's proposal, employers could improperly deny their workers the minimum wage and overtime protections of the FLSA, putting women workers who are misclassified at greater risk of wage theft. Astoundingly, the Department fails to estimate how much workers would lose in wages under its proposal.[14] The Economic Policy Institute estimates that, if finalized, this proposal will result in at least $3.3 billion in transfers from workers to employers each year. Additionally, workers will incur at least $400 million from ongoing paperwork for being newly misclassified as independent contractors. This means the total cost to workers will be at least $3.7 billion annually.[15]

[8] Bureau of Labor Statistics, September 2020 Employment Situation Summary, Table A-1: Employment Status of the civilian population by sex and age, https://www.bls.gov/news.release/empsit.t01.htm.
[9] Jasmine Tucker, Equal Pay for Mothers is Critical for Families, National Women's Law Center (May 2017), https://nwlc.org/wp-content/uploads/2017/05/Motherhood-Wage-Gap.pdf.
[10] Campbell Robertson and Robert Gebeloff, How Millions of Women Became the Most Essential Workers in America (April 18, 2020), https://www.nytimes.com/2020/04/18/us/coronavirus-women-essential-workers.html.
[11] Bureau of Labor Statistics, September 2020 Employment Situation Summary, Table A-1: Employment Status of the civilian population by sex and age, https://www.bls.gov/news.release/empsit.t01.htm.
[12] Jasmine Tucker and Claire Ewing-Nelson, COVID-19 Is Making Women's Economic Situation Even Worse, National Women's Law Center (September 2020), https://nwlc.org/wp-content/uploads/2020/09/PulsedataFS-1.pdf
[13] Jasmine Tucker and Julie Vogtman, When Hard Work Is Not Enough: Women in Low-Paid Jobs (April 2020), https://nwlc.org/wp-content/uploads/2020/04/Women-in-Low-Paid-Jobs-report_pp04-FINAL-4.2.pdf.
[14] Executive Order 13653 requires agencies to "quantify anticipated present and future benefits and costs as accurately as possible". Exec. Order No. 13563, Improving Regulation and Regulatory Review, 3 C.F.R. § 13563 (2011).
[15] Economic Policy Institute, Comment Letter on Proposed Rule on Independent Contractor Status Under the Fair Labor Standards Act (forthcoming Oct. 26, 2020).

The proposed rule may also jeopardize other protections that rely on the FLSA's standards of employment. Those of particular importance to women workers include protections from gender-based wage discrimination, break time for nursing workers, and paid leave.

Since 1963, the *Equal Pay Act* (EPA) has prohibited employers from paying unequal wages to workers who perform substantially equal work, regardless of sex. Yet, fifty-seven years later, the gender pay gap persists. On average, women today earn 82 cents for every dollar earned by men.[16] The gender wage gap is even worse for women of color, with Black women making 62 cents, Hispanic women making 54 cents, Native Hawaiian or Pacific Islander women making 61 cents, American Indian or Alaska Native women making 57 cents, and Asian-American women making 89 cents for every dollar paid to white, non-Hispanic men.[17] The gender wage gap persists in nearly every line of work, regardless of education, experience, occupation, industry, or job title. This has severe consequences for the lives of working women and families and for our economy. And despite the overrepresentation of women of color in low-wage jobs on the frontlines of the coronavirus pandemic, they are still disproportionately underpaid for their work, further exacerbating the gender and racial wage gap.[18] Pay discrimination is already difficult to prove because employee pay is often cloaked in secrecy.[19] The U.S. Equal Employment Opportunity Commission (EEOC) has enforcement and subregulatory authority over the EPA. Because the EPA amended the FLSA, the Department's proposed rule could create greater confusion among courts and make it even harder for workers to bring successful pay discrimination claims.

Workplace protections for new mothers, including breastfeeding accommodations, are important for improving maternal and infant health outcomes. Nearly a quarter of working mothers go back to work within two weeks of childbirth, and the disparities are even more profound for women of color in low-wage jobs who lack access to paid family leave.[20] Enacted as part of the *Affordable Care Act*[21] in 2010, the *Break Time for Nursing Mothers Act* amended the FLSA to require employers to provide covered employees with reasonable break time to express milk and provide access to a private, non-bathroom space in which to do so.[22] Working mothers should not be forced to choose between breastfeeding their infants and keeping their jobs. Under this proposed rule, nursing workers could face increased misclassification, making them ineligible for this protection. This would undermine their health and the health of their infants, as well as put them at greater risk of losing employment for asserting their nursing needs.[23]

Providing all workers with adequate paid leave is an economic issue for working families. A national paid family and medical leave program would help foster a more equitable society. In March, Congress passed the *Families First Coronavirus Response Act* (FFCRA) in response to the unprecedented public health crisis from the coronavirus (COVID-19) pandemic. The FFCRA provides eligible workers with up to two weeks of paid sick leave for COVID-19 related reasons and twelve weeks (10 of which are paid) of

[16] The Simple Truth About the Gender Pay Gap, American Association of University Women (Fall 2019), https://www.aauw.org/resources/research/simple-truth/.
[17] *Id.*
[18] Maya Raghu and Jasmine Tucker, The Wage Gap Has Made Things Worse for Women on the Front Lines of COVID-19 (March 2020), https://nwlc.org/blog/the-wage-gap-has-made-things-worse-for-women-on-the-front-lines-of-covid-19/
[19] The Paycheck Fairness Act (H.R. 7): Equal Pay for Equal Work Before H. Subcomm. on Civil Rights and Human Servs. & H. Subcomm. on Workforce Prots. of the H. Comm. on Educ. and Labor, 116th Cong. (2019) (written testimony of Fatima Goss Graves, President and CEO of National Women's Law Center, at 7) [Hereinafter Goss Graves Testimony].
[20] Christine Broderick, Paid Leave and Breastfeeding: A Perfect Combination for Mom and Baby (August 2019), https://www.nationalpartnership.org/our-impact/blog/general/paid-leave-and-breastfeeding-perfect-combination-for-mom-and-baby.html.
[21] Patient Protection and Affordable Care Act, Pub. L. No. 111-148.
[22] 29 U.S.C. 207(r).
[23] *See, e.g., Exposed: Discrimination Against Breastfeeding Workers*, Center for WorkLife Law, https://www.pregnantatwork.org/wp-content/uploads/WLL-Breastfeeding-Discrimination-Report.pdf

emergency *Family and Medical Leave Act* (FMLA) leave to care for a child if their school is closed or child care provider is unavailable. This legislation represents a milestone in providing millions of workers with access to paid leave protections for the first time in this nation's history, but there are still far too many workers who were excluded from the law's protections. Because the FFCRA's emergency paid leave provisions and emergency paid family leave provisions rely on the FLSA's standards of employment, this proposed rule could threaten a critical lifeline and leave even more workers without vital protections during a pandemic. The FFCRA provides tax credits for true independent contractors for purposes of paid leave, but workers also need the right to take leave, and they need protections from retaliation from doing so—rights given to employees under the FFCRA paid leave provisions. Employees misclassified as independent contractors could be denied these rights by their employers.

Equal pay requirements, break time for nursing workers, and paid leave are hard-fought protections that promote the health and economic security of millions of working women and their families. The Department's proposed rule fails to acknowledge or quantify the potential effects for workers if they are stripped of these key protections.

According to recent reports, the Department is attempting to complete this rule before the end of the year.[24] Fast tracking a rule that would exclude workers from critical protections during a period of deep economic strife goes against the mission of the Department to assure work-related benefits and rights for wage earners and job seekers. We implore the Department to stop this attempt to push through a rule that would leave workers, including women, worse off, especially without providing the public an adequate opportunity to participate and comment in this process[25] and without the required information about how the proposed rule would negatively affect workers. We strongly urge the Department to withdraw its harmful proposed rule.

Sincerely,

Suzanne Bonamici
Chair
Subcommittee on Civil Rights and Human Services
Committee on Education and Labor

Alma S. Adams, Ph.D.
Chair
Subcommittee on Workforce Protections
Committee on Education and Labor

ADDITIONAL SIGNATORIES

Raúl M. Grijalva
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[24] Ben Penn, *DOL Aims to Fast-Track Worker Classification Rule to 2020 Finish*, (July 2, 2020), https://news.bloomberglaw.com/daily-labor-report/dol-aims-to-fast-track-worker-classification-rule-to-2020-finish

[25] The Department has already strayed from rulemaking requirements by providing for only a 30-day comment period, rather than the required 60-day comment period. Under section 2(b) of Executive Order 13563, Improving Regulation and Regulatory Review, the Department must "afford the public a meaningful opportunity to comment . . . with a comment period that should generally be at least 60 days."